

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OREE RILEY,

Defendant-Appellant.

UNPUBLISHED

April 3, 2003

No. 238196

Wayne Circuit Court

LC No. 01-002303-01

Before: Kelly, P.J. and White and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right his nine to fifteen year prison sentence for unarmed robbery, MCL 750.530. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant maintains on appeal that the trial court's decision to sentence him above the sentencing guidelines range was improper. The guidelines range for this offense was twenty-nine to fifty-seven months. Defendant's minimum sentence of nine years in prison exceeded the maximum guidelines sentence by approximately twofold.

Because the offense occurred after January 1, 1999, the statutory sentencing guidelines apply. MCL 769.34(2); *People v Greaux*, 461 Mich 339, 342 n 5; 604 NW2d 327 (2000). The court must impose a minimum sentence within the guidelines range unless a departure from the guidelines is permitted. MCL 769.34(2); *People v Hegwood*, 465 Mich 432, 438-439; 636 NW2d 127 (2001). The court may depart from the guidelines if it "has a substantial and compelling reason for that departure and states on the record the reasons for the departure." MCL 769.34(3); *People v Babcock (After Remand)*, 250 Mich App 463, 465; 648 NW2d 221 (2002). Moreover, the statute further restricts the trial court's ability to depart from the guidelines range:

The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight. [MCL 769.34(3)(b); *Babcock, supra* at 466.]

Only objective and verifiable factors may be used to assess whether there are substantial and compelling reasons to deviate from the minimum sentence range under the guidelines. *Babcock, supra* at 467. The determination regarding the existence, or nonexistence, of a particular reason or factor is reviewed on appeal under the clearly erroneous standard. *Id.* The determination that a particular factor is objective and verifiable is reviewed by this Court as a matter of law. *Id.* The trial court's determination that objective and verifiable factors present a substantial and compelling reason to depart from the minimum sentence range is reviewed for an abuse of discretion. *Id.*

This Court has explained the terms “substantial and compelling” as constituting strong language intended only to exist in exceptional cases. *Id.* at 466. Substantial and compelling reasons exist only in exceptional cases and the reasons justifying departure should keenly or irresistibly grab the court's attention and be recognized as having considerable worth in determining the length of the sentence. *Id.*

During defendant's sentencing, the trial court identified several different reasons for departing above the sentencing guideline range. First, the trial court found that the guidelines did not “fully envision and entirely compute or accurately reflect the kind of life changing consequences this has had for the complainant” In its departure evaluation, the trial court identified four factors supporting departure:

- (1) Victim was elderly widow, targeted for a broad daylight robbery;
- (2) Victim's injuries have taken from her many of her everyday activities;
- (3) Defendant has a history of violent robberies;
- (4) Defendant and another committed brazen daylight robbery that has ruined quality of life.

We find the first three of these factors to be substantial and compelling reasons for departure.¹ As the trial court noted, the victim “has virtually become a prisoner in her own home. That for someone who has worked and contributed to this community and who was truly an innocent victim, it is intolerable that anyone should have to experience that.” The trial court noted that the victim was “specifically singled out and targeted because of her perceived vulnerability,” and also identified defendant's escalating criminal conduct, which contained some of the same elements as the offense in this case, and which demonstrated the “same kind of violence that poses as danger to the community.”

The objective and verifiable facts cited by the trial court “keenly” and “irresistibly” grab our attention, are “of considerable worth” in deciding the length of defendant's sentence, and were supported by the record. We agree with the trial court that the factors were not adequately represented by the guidelines. While defendant received points for his prior high severity

¹ Factor number four, in that it refers to “quality of life,” is a subjective rather than an objective factor. To that extent, it was improperly considered by the trial court. However, this does not alter the result in this case.

juvenile adjudication, the points did not adequately take into account that the prior adjudication was for armed robbery, rather than some other high severity offense, or that defendant had already been placed at the Maxey Boys Training facility. Further, although defendant received ten points under OV 10 for exploiting the elderly victim's vulnerability, this factor did not adequately account for the brazen nature of the offense, being committed at a gas station in broad daylight, i.e. at a time and place where an elderly person might otherwise feel safe.

For these reasons, we also find that the departure was proportionate to the seriousness of the circumstances surrounding the offense and the offender. The substantial and compelling reasons relied upon by the trial court justified this particular departure on the particular facts of this case. See *Hegwood*, *supra* 437 n 10. The trial court did not abuse its discretionary authority.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Helene N. White